

No. 16553

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United States  
Court of Appeals  
for the Ninth Circuit

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DAN O. HOYE, as Controller of the City of Los Angeles, DAN O. HOYE and THE CITY OF LOS ANGELES, Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue, Appellees.

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Transcript of Record

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Appeal from the United States District Court for the Southern District of California, Central Division

FILED

DEC - 2 1959

PAUL P. O'BRIEN, CLERK



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DAN O. HOYE, as Controller of the City of Los  
Angeles, DAN O. HOYE and THE CITY OF  
LOS ANGELES, Appellants,

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A. RIDDELL, Director of Internal Revenue,  
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(Cause No. 16553)

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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\* Page numbers appearing at bottom of page of Original Transcript of Record.



United States District Court For The Southern  
District of California, Central Division

No. 1065-57-T Civil

DAN O. HOYE, as Controller of the City of Los  
Angeles, and DAN O. HOYE, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of Internal Revenue, and RICHARD A. WESTBERG,  
Defendants.

UNITED STATES OF AMERICA,  
Plaintiff in Intervention,

vs.

DAN O. HOYE, CITY OF LOS ANGELES, and  
RICHARD A. WESTBERG,  
Defendants in Intervention.

ANSWER OF CERTAIN DEFENDANTS  
IN INTERVENTION

Come Now defendants in intervention, Dan O. Hoyer, and City of Los Angeles, a municipal corporation, and answering the Amended Complaint In Intervention For Penalty and For Foreclosure of Internal Revenue Tax Lien Against Personal Property for themselves only and for no other

defendant in intervention admit, deny and allege as follows: [1-A]

### Answer to First Cause of Action

#### I.

These answering defendants in intervention admit paragraphs numbered 1, 4, 6, 7, 8, and 9, of said Complaint in Intervention.

#### II.

These answering defendants admit that the above entitled court has jurisdiction of matters arising under 28 U.S.C. paragraphs 1340, 1345; denies that the above entitled court has jurisdiction in the instant action under 26 U.S.C. 7401, 7403, and 6332, as alleged in paragraph 2, of said complaint, and alleges that no facts exist in the instant case that come within said sections 7401, 7403, and 6332; that the money in the hands of the defendant in intervention, Dan O. Hoyer, as Controller of the City of Los Angeles, is held by virtue of California Code of Civil Procedure, Section 710; that said Section 710 reads as follows:

“[Enforcement of judgment against debtor to whom money is owed by state, county, etc.: Procedure.] (a) Whenever a judgment for the payment of money is rendered by any Court of this State against a defendant to whom money is owing and unpaid by this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may

file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

1. If such money, wages or salary is [1-B] owing and unpaid by this State to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the state department, board, office or commission owing such money, wages or salary to said judgment debtor prior to the time such state department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller or to the State Personnel Board. Said State department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact that the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall note also any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the state department, board, officer or commission for any

amounts advanced to said judgment debtor or by him owed to the State of California, and after deducting [1-C] therefrom an amount equal to one-half the salary or wages owing to the judgment debtor for his personal services to the State rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body [1-D] rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the great-

est extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.

(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such [1-E] payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination



and order the distribution of the money held by the county clerk in accordance therewith.

(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to any elective officer of this State whose salary is fixed by Section 19 of [1-F] of Article V of the State Constitution.

(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund."

These answering defendants further allege that there has never been any refusal or neglect on their part or either of them to pay any tax or to dis-



charge any liability in respect thereof to the plaintiff in intervention, but that in view of the prohibitions contained in Section 710, of the California Code of Civil Procedure, the defendant Dan O. Hoye, individually and as Controller of the City of Los Angeles did withhold the payment of the moneys demanded by the plaintiff in intervention and as Director of Internal Revenue, but at no time has he or the defendant City of Los Angeles refused to pay said sum over to the United States of America or the Director of Internal Revenue when said parties were entitled thereto.

### III.

Answering paragraph 3, of said Complaint in Intervention these answering defendants in intervention do not have sufficient information or belief to properly answer the same and basing their answer on that ground deny generally and specifically each and every allegation contained therein.

### IV.

Answering paragraph 5, of said complaint these answering defendants in intervention admit the allegations thereof [1-G] excepting the last sentence of said paragraph set forth on lines 19 and 20 of page 2 thereof, and with reference thereto they and each of them deny that interest accrues on said alleged tax liability at the daily rate of .02 until paid under the facts and circumstances of this case.

## V.

Answering paragraph 6, of said Complaint in Intervention these answering defendants in intervention admit that a "Notice of Levy" was served upon the defendant in intervention, Dan O. Hoye, as Controller of the City of Los Angeles.

## VI.

Answering paragraph 10, of said Complaint in Intervention these answering defendants in intervention deny generally and specifically each and every allegation contained therein; deny that they or either of them at any time refused to pay over or surrender the property, rights to property, moneys, credits or other obligations to the plaintiff in intervention, and allege that the money owing to the defendant in intervention, Richard A. Westberg, were withheld and are still withheld by the defendant in intervention, Dan O. Hoye, as Controller of the City of Los Angeles, in view of the provisions and prohibitions of California Code of Civil Procedure, Section 710, as hereinabove quoted.

## Answer to Second Cause of Action

Answering the allegations contained in the Second Cause of Action of the Complaint in Intervention these answering defendants in intervention admit, deny and allege as follows:

## I.

Answering paragraph numbered 11, of the Second Cause of Action these answering defendants in

intervention repeat and re-allege the applicable provisions and allegations contained in paragraphs 1, 2, 3, and 4, of their answer to the First Cause of Action. [1-H]

## II.

These answering defendants in intervention admit paragraphs 12 and 13 of the Second Cause of Action.

## III.

Answering paragraph 14, of the Second Cause of Action these answering defendants in intervention do not have sufficient information and belief to properly answer the same and basing their answer upon that ground deny generally and specifically each and every allegation contained therein; and allege that if by virtue of the serving of the Notice of Levy and Final Demand as alleged by the plaintiff in intervention constitutes a lien upon the money in the hands of these answering defendants in intervention earned by and belonging to the defendant Richard A. Westberg, that since these answering defendants are barred from the payment of said sum by Section 710, of the California Code of Civil Procedure, a conflict of laws resulted and does result from the service of said notices, and said conflict must be judicially determined before the defendant in intervention Dan O. Hoyer, as Controller of the City of Los Angeles is permitted to pay over said funds to the plaintiff in intervention without being personally liable to the defendant in intervention, Richard A. Westberg.

For A First Separate and Distinct Defense These  
Answering Defendants In Intervention Allege  
As Follows:

I.

That on or about March 19, 1957, Robert A. Riddell, acting on behalf of United States of America, and as Director of Internal Revenue, Sixth District, California, served upon the defendant in intervention, Dan O. Hoye, a "Notice of Levy" thereby claiming the sum of \$155.93 to be due and owing to the United States of America from the defendant in intervention Richard A. Westberg, who at said time was an employee of the [1-I] City of Los Angeles; that on said date the City of Los Angeles was indebted to the defendant Westberg in the sum of \$158.78, and said sum was then payable to said defendant; that due to the service of said notice the defendant Hoye withheld payment of any moneys to the defendant Westberg and thereafter on or about June 25, 1957, Robert A. Riddell as Director of Internal Revenue as aforesaid served upon the defendant Hoye a "Final Demand" thereby demanding said sum of \$155.93 be paid to him; that the defendant Hoye did not pay said sum of \$155.93 to the Director of Internal Revenue, or the United States of America, nor did he pay said sum to the defendant in intervention Westberg; that in view of the provisions and prohibitions contained in Section 710, of the California Code of Civil Procedure the defendant Hoye held said moneys in his possession and still retains the same, and that he stands

ready, able and willing to pay said sum of money being withheld from defendant Westberg or United States of America to any person or persons legally entitled thereto as determined by the above entitled court and concurrently with the filing of this Answer the defendant in intervention Hoyer will deposit the same with the Clerk of the above entitled court in order that said sum of money may be ordered to be paid to the person or persons legally entitled thereto; that these answering defendants in intervention have not, and at no time and do not now make any claim to said money or any part thereof except that in his capacity as a public official required to observe and comply with the Constitution and Laws of the State of California, the defendant in intervention Dan O. Hoyer seeks to pay the moneys now in his possession only to the person or persons legally entitled thereto, so that he may be discharged from his liability as custodian of said money; that to pay said sum of money to the plaintiff in intervention, United States of America, or the Director of Internal Revenue without the proper authority of a court of competent jurisdiction would be in violation of [1-J] Section 710 of the California Code of Civil Procedure, and would cause the defendant in intervention Dan O. Hoyer, to be personally liable for any moneys so paid.

For A Second Separate And Distinct Defense These  
Answering Defendants In Intervention Allege  
As Follows:



## I.

Repeats and re-alleges paragraph 1, of their Second Separate and Distinct Defense hereinabove stated, the same as though fully set forth herein.

## II.

That since there appears to be and is a conflict of laws as to the person or persons entitled to the moneys now being withheld by the defendant Dan O. Hoyer, as Controller of the City of Los Angeles, said defendant Hoyer instituted an action in the above entitled court, entitled "Dan O. Hoyer, as Controller of the City of Los Angeles, and Dan O. Hoyer, Plaintiffs, vs. The United States of America, Robert A. Riddell, Director of Internal Revenue, and Richard A. Westberg, Defendants. Civil Action No. 1065-57-T." said complaint entitled "Complaint to Quash a "Notice of Levy" and "Final Demand" Served On a Municipal Corporation By The Director of Internal Revenue." said complaint having been filed on September 10, 1957, a copy thereof being attached hereto marked "Exhibit A" and made a part hereof the same as though fully set forth herein. That thereafter the defendants United States of America and Robert A. Riddell did on or about November 12, 1957, file their Notice of Motion to Dismiss and Motion to Dismiss and supporting memorandum, together with a Notice of Motion to Intervene and Motion to Intervene, of the United States of America, a copy of the proposed Complaint in Intervention for Penalty under

Section 63.32 (b) of the 1924 Internal Revenue Code being attached to the Notice of Motion to Intervene. That on or about February 6, 1958, after argument by counsel of the respective parties the Honorable [1-K] Ernest A. Tolin, Judge of the above entitled court entered an order granting the defendants Motion to Dismiss and granting said defendants Motion to Intervene and that the order permitting Intervention by the United States of America was signed on said date. That thereafter on February 24, 1958, a copy of a Complaint in Intervention for Penalty under Section 63.32 (b) of the 1954 Internal Revenue Code was served upon the defendant in intervention Dan O. Hoyer; that on or about February 25, 1958, a further Amended Complaint in Intervention for Foreclosure of Internal Revenue Tax Lien Against Personal Property was served upon these answering defendants in intervention and on March 6, 1958, a "Summons on Amended Complaint in Intervention" was served upon these answering defendants by the plaintiff in intervention the United States of America; that thereafter on March 10, 1958, the Honorable Ernest A. Tolin, as Judge of the above entitled court signed an order "Granting Motion to Dismiss" in words as follows:

"Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this

is not a final order under Fed. R. Civ. P. 54 (b), since the United States of America has filed its complaint in intervention."

a copy of said order being attached hereto marked "Exhibit B" and made a part hereof the same as though fully set forth herein; that on March 11, 1958, these answering defendants in intervention received notice that the order granting Motion to Dismiss said case had been entered on March 10, 1958.

### III.

On March 17, 1958, the defendant in intervention [1-L] Dan O. Hoyer, as Controller of the City of Los Angeles and Dan O. Hoyer, as plaintiffs in the above described action filed their "Notice of Appeal" to the United States Court of Appeals for the Ninth Circuit from the Order Granting Motion to Dismiss entered in the above entitled action on March 10, 1958, and thereafter filed their cost bond on appeal and the designation of record on appeal; that said appeal is now pending before the United States Circuit Court of Appeals, Ninth Circuit.

### IV.

That on or about the 25th day of March 1958, Dan O. Hoyer as Controller of the City of Los Angeles as defendants in intervention in this proceeding applied to the Honorable Ernest A. Tolin, Judge of the above entitled court, for an order extending time to answer the complaint in intervention filed



by the United States of America; that said application was made on the ground that an appeal to the United States Circuit Court of Appeals is pending in said matter, said appeal being made to determine whether or not the United States District Court has jurisdiction of the complaint originally filed by the defendant Dan O. Hoyer and that the dismissal of said complaint by said court as hereinabove alleged was error; that the application of said defendants in intervention was summarily denied and that this answer is filed as a result of said denial of an extension of time to answer the complaint in intervention herein; that no such answer should have been required until the appeal has been determined.

For A Third Separate And District Defense These  
Answering Defendants In Intervention Allege:

I.

That the complaint of the plaintiff in intervention does not state facts sufficient to constitute a cause of action against these answering defendants in intervention in that:

(a) At the time the complaint in intervention [1-M] was permitted to be filed a prior complaint was on file in the above entitled action wherein these answering defendants in intervention were plaintiffs and the plaintiffs in intervention were defendants and that the court had jurisdiction of the parties and the subject matter concerned in said com-

plaint and it was therefore error to permit the filing of the complaint in intervention.

(b) That the above entitled court by its own ruling and order signed and dated March 10, 1958, attached hereto marked "Exhibit B" expressly declares that said court does not have jurisdiction of the subject matter herein nor jurisdiction of the persons herein, and that said lack of jurisdiction was not cured by ordering a dismissal of the complaint originally filed by these answering defendants in intervention nor by permitting the filing of a complaint in intervention.

Wherefore, these answering defendants in intervention pray:

1. That the plaintiff in intervention take nothing by reason of its complaint in intervention on file herein;

2. That said complaint be dismissed for failure to state facts sufficient to constitute a cause of action against these answering defendants in intervention;

3. That the original complaint of the plaintiffs, Dan O. Hoye, as Controller of the City of Los Angeles and Dan O. Hoye, be reinstated herein and that the defendants the United States of America and Robert A. Riddell, Director of Internal Revenue, and Richard A. Westberg, be ordered to answer said complaint;

4. For its costs incurred herein and for such other and further relief as to the court seems just.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

ALFRED E. ROGERS,

Assistant City Attorney, [1-N]

/s/ By T. PAUL MOODY,

Deputy City Attorney,

Attorneys for Plaintiffs.

[Note: Exhibit "A"—"Complaint to Quash a 'Notice of Levy' and 'Final Demand' served on a Municipal corporation by the Director of Internal Revenue" is set out at pages 3-7 of Cause No. 15964.]

[Note: Exhibit "B"—"Order Granting Motion to Dismiss" is set out at page 27 in Cause No. 15964.]

Duly Verified. [1-U]

Affidavit of Service by Mail Attached. [1-V]

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

## STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed as follows, by and between the parties hereto, through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith and without prejudice to their right to object to the materiality, relevancy, or competency of any of the following facts agreed to; and it is further stipulated and agreed that any instrument or document referred to herein as Document # . . . ., or a photo reproduction thereof, may be introduced into evidence without any foundation being laid as to authenticity, [2] without prejudice to the right of any party to object to the competency (except as hereinabove provided), materiality, or relevancy thereof:

1. The United States of America is a sovereign and corporate body politic;

2. Intervention in this action was directed by the Attorney General of the United States and authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States;

3. Defendant in intervention Dan O. Hoye is the duly elected, qualified, and acting Controller of the City of Los Angeles, California;

4. Defendant in intervention City of Los Angeles is a municipal corporation of the State of California;

5. On the 15th day of August, 1956, a delegate of the Secretary of the Treasury of the United States assessed federal income taxes for the calendar year 1955 and penalties and interest thereon in the aggregate amount of \$150.63 against the defendant in intervention and taxpayer Richard A. Westberg. On or about August 20, 1956, notice thereof was given to, and demand for the payment of said assessed taxes, penalties and interest was made upon said taxpayer; but notwithstanding notice and demand, no part of said tax, penalties and interest has been paid and the whole remains assessed, outstanding and unpaid. Interest accrues on said tax liability at the daily rate of \$.02 until paid.

6. On March 19, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoyer a Notice of Levy, Document #1, in the sum of \$155.93, upon all property and rights to property belonging to the aforesaid taxpayer.

7. On June 25, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoyer [3] a Final Demand, Document #2, for the amount set forth in the Notice of Levy, \$155.93.

8. On the dates of service of said Notice of Levy and Final Demand, as aforesaid, the defendant in intervention Richard A. Westberg was an employee of the defendant in intervention City of Los Ange-



les, and said City was indebted to said Richard A. Westberg in the sum of \$158.78.

9. Upon receipt of the Notice of Levy as aforesaid, defendant in intervention Dan O. Hoyer, as Controller of the City of Los Angeles, did not pay said sum to said Richard A. Westberg.

10. The defendant in intervention Dan O. Hoyer at the time of service of said Notice of Levy and at the time of service of said Final Demand, as aforesaid, would not and has refused to pay over or surrender the property, rights to property, monies, credits, and other obligations owing to the defendant in intervention Richard A. Westberg, which were in his possession as aforesaid at the time of service of said Notice of Levy and Final Demand upon him.

11. If defendant in intervention Dan O. Hoyer were called to testify at the trial of this action, he would testify that he did not comply with the Notice of Levy and Final Demand, as hereinabove set forth in paragraph 10, because of Section 710 of the California Code of Civil Procedure.

12. Section 710 of the California Code of Civil Procedure provides in pertinent part as follows:

"§710. [Enforcement of judgment against debtor to whom money is owed by state, county etc.: Procedure.] (a) Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and

unpaid by this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated [4] abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

\* \* \* \* \*

“2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent

the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor." [5]

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EDWARD R. McHALE,  
Assistant U. S. Attorney,  
Chief, Tax Division,  
ROBERT H. WYSHAK,  
Assistant U. S. Attorney,  
/s/ ROBERT H. WYSHAK,  
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City Attorney,  
BOURKE JONES,  
Assistant City Attorney,  
ALFRED E. ROGERS,  
Assistant City Attorney,  
T. PAUL MOODY,  
Deputy City Attorney,  
/s/ T. PAUL MOODY,  
Attorneys for City of Los Angeles  
and Dan O. Hoye. [6]

[Endorsed]: Filed July 25, 1958.



[Title of District Court and Cause.]

## MEMORANDUM OF DECISION

This action arises under the Internal Revenue Code and involves the right of the United States to proceed against a municipal corporation as an employer for the collection of unpaid revenues owed by a delinquent taxpayer who is also an employee of the municipal corporation. [7]

The United States, not needing the aid of court procedure in such a circumstance, served a notice of levy and final demand upon the City of Los Angeles as the employer of a delinquent taxpayer for payment of his right to accrued wages due and owing by the City. In order to prohibit such action, the Controller of the City of Los Angeles brought a primary action for an injunction which also sought a declaratory judgment to quash the notice of levy and final demand made upon the City. The United States then intervened as a party plaintiff against Dan O. Hoyer, the Controller of the City of Los Angeles, and Richard A. Westberg, the delinquent taxpayer, as parties defendant, for the recovery of the monies alleged due under the Internal Revenue Code.

The motion by the United States to dismiss the complaint against it in the primary action was granted by this Court. This was done because the cause of action as stated in the primary complaint requests certain injunctive relief which is specifically prohibited by Section 7421 of Title 26, U. S. C.

(Internal Revenue Code of 1954.) Furthermore, such action is in the nature of declaratory relief which is also specifically prohibited by Section 2201 of Title 28, United States Code. An appeal was made from the granting of the Motion to Dismiss and is presently pending before the Appellate Court. However, the suit in intervention brought by the United States is still before the court and constitutes the only matter currently under consideration.

Using its right as a sovereign, the United States asserts its right to declaratory relief to the problem at hand even though such right is not available to plaintiffs. The ethics of prohibiting the subject of [8] a sovereign from utilizing a particular procedure in bringing a matter of litigation before the Court even though the sovereign, the Federal Government here, may do so, is for the consideration of a different authority than this Court. Seeking merely to follow the law as it is found, this Court granted the Order Permitting Intervention by the United States of America, and consequently opened a door for the Federal Government which had been locked by statute against the plaintiff, a private litigant.

The salient facts are as follows:

Richard A. Westberg, a defendant in intervention, was an employee of the City of Los Angeles and was delinquent in his payments of Federal income tax. An assessment was made against him which gave rise to a lien upon all accrued wages due him by his employer (to the extent of the delin-

quency) and a levy was served upon Dan O. Hoyer, the Controller of the City of Los Angeles, also a defendant in intervention, for the sum of \$155.93 against any accrued wages owed to Westberg. At that time the City owed Westberg \$158.78, a sum slightly in excess of the levy. Hoyer, however, refused to honor the levy, taking the position that the United States was required to comply with certain procedures set forth in the California Code of Civil Procedure relating to judgment creditors. Denying that the United States must comply with a state statute and become a judgment creditor in order to collect its revenue, the United States brought its complaint in intervention, first against Hoyer as an individual to collect the penalty provided for failure to honor the levy [as found in § 6332(b) of the 1954 Internal [9] Code], and second against Hoyer as a representative of the City to foreclose the tax lien as asserted against Westberg.

The basic issue was agreed by all appearing<sup>1</sup> parties to be whether the collection procedures of the Internal Revenue officials in the collection of monies past due under the Internal Revenue laws may be enforced uniformly without regard to conditions prescribed by a state legislature for judgment creditors.

The California statute involved,<sup>2</sup> stripped of portions non-essential to this case, reads:

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<sup>1</sup> Although named as a party and served in the case, Richard A. Westberg never entered an appearance in the litigation.

<sup>2</sup> California Code of Civil Procedure, Section 710.

“(a) Whenever a judgment for the payment of money is rendered by any court of this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

\* \* \* \* \*

“(2) If such money, wages or salary is [10] owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or

transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

\* \* \* \* \*

“(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.” [11]

The quick answer to the question raised by the stated issue is that the California statute applies by its terms to “\* \* \* a judgment for the payment of money \* \* \* rendered by any court of this State.” [California]

The statute does not relate to any type of obligation except “a judgment for payment of money.”<sup>3</sup> None of the other cited California statutes<sup>4</sup> refer to the type of obligation the United States sought to enforce in this instance.

It is only by reason of the municipal official (Controller Hoyer) inferring something new into the statute that the problem arises at all. The Controller’s position certainly is not based upon the language of any cited statute.

The Internal Revenue Code of 1954, 26 U.S.C., is very specific as to certain methods of tax collection available to the Secretary of the Treasury or his delegate. In part the Code provides:

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<sup>3</sup> Apparently only a judgment of a California Court, Sec. 710 California Code of Civil Procedure.

<sup>4</sup> Secs. 304, 371 and 374, Charter of the City of Los Angeles (California Stats. 1925).



## “§ 6331. Levy and distraint

“(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the [12] Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

## “§6332. Surrender of property subject to levy

“(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his dele-

gate, except such part of [13] the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

“(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

“(c) Person defined.—The term ‘person,’ as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.”

The City of Los Angeles is a Municipal Corporation. Section 6332(c) quoted above makes no distinction in its applicability to different classes of corporations. That this type of statute is valid, appears clearly from the following language of the Supreme Court.<sup>5</sup>

“The act is a law of the United States [14] made in pursuance of the Constitution and, therefore, the supreme law of the land, the Constitution or laws of the states to the contrary notwithstanding. When-

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<sup>5</sup> Florida v. Mellon, 273 U.S. 12, at 17 (1927).

ever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield \* \* \*.”<sup>6</sup>

The contention by Hoye that the enforcement of the levy and final demand would cause him to be personally liable to the municipal employee for any money paid pursuant thereto is without merit. Payment to the Government pursuant to such a levy is a complete defense against any action brought against the debtor on account of the debt. In 1955, it was said by the Court of Appeals for [15] the Fourth Circuit:<sup>7</sup>

“\* \* \* The effect of the federal taxing statutes to which we have referred is to create a statutory attachment and garnishment in which the service of notice provided by statute takes the place of the court process in the ordinary garnishment proceeding. \* \* \* The service of such notice results in what is virtually a transfer to the government of the in-

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<sup>6</sup> The “act” in *Florida v. Mellon* refers to Sec. 301 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 69-70, and reads as follows:

“The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304.”

<sup>7</sup> *United States v. Eiland*, 223 F.2d 118, at 121-122. See also, *Bank of Nevada v. United States*, 251 F.2d 820 (9 Cir. 1957).



debtedness, or the amount thereof necessary to pay the tax, so that payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt. \* \* \*”

Defendant in intervention, Dan O. Hoyer, has deposited with the Clerk of the Court a payroll check payable to Richard A. Westberg. This was done without benefit of any order of Court. The Clerk of this Court is not the Secretary or his delegate referred to in the quoted statute. The Clerk is directed to return said check to its maker, and Findings of Fact, Conclusions of Law and Judgment shall be prepared by the United States Attorney as prayed for in the Complaint in Intervention.

Dated: This 11th day of December, 1958.

/s/ ERNEST A. TOLIN,  
U. S. District Judge. [16]

[Endorsed]: Filed December 11, 1958.

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[Title of District Court and Cause.]

## NOTE TO THE MEMORANDUM OF DECISION

In the Memorandum deciding this case, the Court said:

“Using its right as a sovereign, the United States asserts its right to declaratory relief to the problem at hand even though such right is not available to plaintiff.”

This language has offended the Government's Attorney who, [17] upon receiving the Memorandum, immediately protested that the United States had not asked for declaratory relief in its Amended Complaint in Intervention. As far as pleading non-enclature is concerned this contention is true. However, in substance it is somewhat inaccurate. The Amended Complaint in Intervention prayed judgment against the Defendant in Intervention Dan O. Hoyer in his own person and estate alleging that Hoyer had disregarded a notice of levy upon the property of the taxpayer Westberg. Plaintiff also sought foreclosure of its tax lien against the debt owed the taxpayer and Defendant in Intervention. In other words, it asked for a money judgment. There was no prayer for declaratory relief. When the motion to dismiss plaintiff's original Complaint was heard, counsel for the Government asserted that although Plaintiff Hoyer could not maintain a declaratory relief action, the Government agreed that the controversy was one upon which there should be a declaration of the rules governing exactly this type of apparently frequently recurring situation in which the Federal Government gives a notice of levy upon a municipal employee's earnings. Government counsel then stated that the Government would itself intervene to the end that there might be a declaration of rights. The Court, accordingly, undertook in its Memorandum to make its declaration; but it should be noted that this was incidental to the strict actions at law pleaded, the First Action At Law being for penalty, and the Second (in which

the taxpayer was named a party defendant) for foreclosure of Internal Revenue tax lien against personal property.

Dated: This 12th day of December, 1958.

/s/ ERNEST A. TOLIN,  
U. S. District Judge. [18]

[Endorsed]: Filed December 12, 1958.

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[Title of District Court and Cause.]

#### ADDENDUM TO THE MEMORANDUM OF DECISION

A second addendum to the Memorandum of Decision becomes necessary because proposed findings of fact, conclusions of law and judgment point up an important facet of the controversy which was not fully developed at the trial or then fully appreciated or definitively ruled upon [19] by the trial Judge. The case was litigated principally upon the issue of whether the United States in giving a Notice of Levy to secure payment of delinquent income tax upon the monies, credits, etc. due a Municipal employee and in possession of a Municipal government was obligated to proceed as an ordinary creditor. The Court is satisfied that its decision of this element of the case as set forth in the Memorandum of Decision is valid.

At the time of trial and decision it appeared that the contention was that Section 6332 of Title 26,

United States Code, simply had the effect of fixing liability for the tax and interest upon defendant Hoyer should the United States fail to collect the tax owed by defendant in intervention Richard A. Westberg by reason of Hoyer's failure or refusal to honor the levy. It should be said that the Amended Complaint in Intervention does not exclude the theory that Hoyer, the City Controller, is subject to a pure penalty. At the trial such a theory was not argued. Liability to the extent of a loss occasioned by failure to honor a levy seemed to be the reasonable result to visit upon the City Controller. It did not occur to the Court, nor did counsel suggest, that the sovereign was intending to penalize the Controller of the City of Los Angeles because he had sought to clarify a legal situation which was to him unclear. The proposed Judgment quite properly and clearly undertakes to collect the amount of the tax with interest and costs by way of foreclosure of the tax lien against the debt owed by the City of Los Angeles to the taxpayer and defendant in intervention Richard A. Westberg. There is no quarrel with the findings and conclusions tendered as to this cause of action. [20]

It is now clear that in addition to that relief, the United States seeks a penal judgment against defendant Dan O. Hoyer in his person and estate in the sum of \$155.93 together with interest and costs at the rate of six percent per annum. This is not sought as indemnification because of ultimate failure of the levy to reach the taxpayer's wages but is sought purely as a penalty. The wages have not been

paid and the foreclosure of the lien thereon should apply them to payment of taxes by mere execution of the judgment filed herewith. The statute in question<sup>1</sup> reads in pertinent part:

“Surrender of property subject to levy

“(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

“(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon [21] demand by the Secretary or his delegate shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

“(c) \* \* \* Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 784.”

There is doubt whether Congress intended to provide a true penalty or whether it intended to only place a responsibility upon one who disregarded a

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<sup>1</sup> Secs. 6332(a) and 6332(b), Title 26, U.S.C.



levy and such disregard would lead to loss by the United States of the funds levied upon. In this connection it is noteworthy that Sec. 6332(b) of Title 26, U.S.C., although titled "Penalty for violation," does not use the word "penalty" in any of the operative language of the statute. The failure to definitively state within the operative language of the statute that a penalty is prescribed at least creates an ambiguity which should be resolved in favor of the officer from whom the penalty is demanded. This follows from application of the general consideration Courts give credit in situations wherein a penalty is sought. It does not necessarily follow that because the word "penalty" appears in a paragraph title, that penalty will be inferred into the body of the statute from which its general context and obvious purport appears to be only remedial.

An Appellate Court has said:

"\* \* \* [I]t is well settled that in the application of penalties 'all questions in [22] doubt must be resolved in favor of those from whom the penalty is sought.' Crawford Statutory Construction, Section 240, page 462."<sup>2</sup>

When the Supreme Court<sup>3</sup> was considering the imposition of penalties under the Clayton Act, and was construing the wording of the statute, it said:

"\* \* \* Decisions of this Court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of

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<sup>2</sup> Hatfried, Inc. v. Commissioner of Internal Rev., 162 F.2d 628, at 633 (6th Cir. 1947).

<sup>3</sup> Van Camp & Sons v. Am. Can Co., 278 U.S. 245, at 253, 254 (1928).

circumstances apart from the plain language used are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity, *United States v. Goldenberg*, 168 U.S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole. *Ozawa v. United States*, 260 U.S. 178, 194 \* \* \*

An offense to the moral sense, created by imposing a [23] penalty against one who is acting in good faith in testing the claim upon which the penalty against one who is acting in good faith in testing the claim upon which the penalty is based, is astutely put in *Anuchick v. Transamerica Freight Lines*,<sup>4</sup> when, in view of a mandatory (by exact language of statute) imposition of a penalty under the Fair Labor Standards Act, it was said:

“\* \* \* [I]t would be manifestly unfair to expect a business man to come to a conclusion on what these two laws meant when read together, under pain of heavy penalty if he didn't guess right. \* \* \*

“Furthermore, under our decisions the law must be clear in order to exact the penalty in a civil case. Here the act is both penal and remedial but the effect is not clear. \* \* \*<sup>5</sup>”

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<sup>4</sup> 46 Fed. Supp. 861, at 866-867 (D.C. Mich. 1942).

<sup>5</sup> The business man's real problem with apparently conflicting statutes was acute in *Anuchick*. To the Court, the problem regarding validity of the levy method of collection, and exemption of the Director from the requirements of Sec. 710, C.C.P., was simple. Penal liabilities, however, are not levied because what is clear to one man is confused to another.



It is impressive that in imposing penalties in other areas of taxation, they are only assessed upon a showing of reasonable cause or in some aggravated [24] circumstance. In construing the terms of an Amendment to the Revenue Act of 1934 requiring that imposition of penalty in the case of failure to make and file a return was not to be made except upon reasonable cause, the Court resolved all reasonable doubts in favor of the taxpayer.<sup>6</sup> In a tax situation, although under a different act, the Court of Appeals for the Sixth Circuit has held that reliance by the taxpayer upon the advice of counsel constituted reasonable cause even though the advice was founded upon mistake or ignorance of the law.<sup>7</sup> In its decision the Court stated:

“Courts are reluctant to construe a statute so as to impose a penalty, unless there has been a substantial delinquency. \* \* \*”

In dealing with a criminal action under the Internal Revenue Laws, the Supreme Court stated:<sup>8</sup>

“\* \* \* It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. \* \* \*” [25]

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<sup>6</sup> *Hatfried, Inc. v. Commissioner of Internal Rev.*, *supra*.

<sup>7</sup> *Dayton Bronze Bearing Co. v. Gilligan*, 281 F. 709, at 714 (6th Cir. 1922).

<sup>8</sup> *Spies v. United States*, 317 U.S. 492, at 496 (1942).

The present case has all the earmarks of a Municipal government honestly undertaking to find the pathway by which it may safely proceed in a frequently recurring situation. The case is devoid of any flaunting of Federal Law. The City Controller sought judicial declaration first by filing an action in the District Court by way of a Complaint which is titled, "Complaint To Quash A 'Notice of Levy' And 'Final Demand Served On A Municipal Corporation By The Director Of Internal Revenue.'" That action was dismissed by the Court for want of jurisdiction. The United States then intervened, although the word "intervened" is tortured by use of a reference to what was done here. Intervention is conventionally had only in a viable action. In this case the United States had successfully procured dismissal of the Controller's Complaint. After the Controller filed his action (which was subsequently dismissed) he artlessly and ineffectively, except as evidence of good faith, undertook to invest the action with some of the qualities of interpleader. The current payroll check of the delinquent taxpayer, Richard A. Westberg, was deposited by the Controller with the Clerk of this Court.<sup>9</sup> On May 22, 1958, the Clerk of Court issued his receipt for said payroll check and held the check until the [26] Memorandum of Decision in this case directed its return to the City Controller. The Controller still holds the

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<sup>9</sup> What was deposited was simply the payroll check, payable to Richard A. Westberg, apparently handed to the Clerk as it would have been delivered to Westberg were it not for the levy.

wages of Westberg. Under these circumstances it cannot be said that the City Controller was acting arbitrarily or with a desire or purpose to aid the delinquent taxpayer in avoiding his taxes. Although the action was dismissed, it was brought by the Controller to test the applicability of a California statute<sup>10</sup> and procure a judicial determination in an area of official conduct. The case is far different from *Sims v. United States*.<sup>11</sup> In that case the State Auditor refused to honor levies of the kind involved here and instead issued and delivered payroll warrants to the taxpayers for their then accrued net salaries. The State Auditor thereby flaunted and defeated the levy. The language, and spirit, of the statute held him liable in his person and estate. This does not shock the conscience, nor is it an intemperate infliction of punishment. It simply visited upon him the natural result of the risk he took by his wilful disregard of the levy and made the Government whole in that particular transaction. It was not punishment but indemnification. In the instant case the Controller of the City of Los Angeles merely sought to obtain judicial direction as to what he should do. He maintained the funds in status quo and even attempted to deposit the money in Court. His legal methods were in error but he did not defeat the levy by paying the funds [27] to the delinquent taxpayer. His good faith is apparent. Judgment foreclosing the tax lien will collect the tax.

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<sup>10</sup> Sec. 710, Code of Civil Procedure.

<sup>11</sup> 27 U.S.L. Week, 4207.

Under these circumstances there should not be a penalty beyond the interest and costs.

Because the Findings of Fact, Conclusions of Law and Judgment submitted by the United States Attorney are so at variance with the Court's views, the Court has re-drafted these documents and directs that they be filed herewith.

Dated: This 22nd day of April, 1959.

/s/ ERNEST A. TOLIN,

U. S. District Judge. [28]

[Endorsed]: Filed April 22, 1959.

In The United States District Court, Southern  
District of California, Central Division

No. 1065-57-T Civil

DAN O. HOYE, as Controller of the City of Los  
Angeles, and DAN O. HOYE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROB-  
ERT A. RIDDELL, Director of Internal Rev-  
enue, and RICHARD A. WESTBERG,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff in Intervention,

vs.

DAN O. HOYE, et al.,

Defendants in Intervention.

### FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled matter having come on for trial before the Honorable Ernest A. Tolin, United States District Judge, presiding without a jury, the plaintiff in intervention represented by its counsel, Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United [29] States Attorney, Chief, Tax Division, and Robert H. Wy-



shak, Assistant United States Attorney, and the plaintiff and defendant in intervention Dan O. Hoyer and the defendant in intervention City of Los Angeles, represented by their attorneys, Roger Arnebergh, City Attorney, Alfred E. Rogers, Assistant City Attorney, and T. Paul Moody, Deputy City Attorney, and the defendant in intervention Richard A. Westberg having been defaulted, after having been duly served the summons and complaint in intervention and he having failed to respond or plead thereto, and the defendants United States of America and Robert A. Riddell having moved to dismiss the complaint for lack of jurisdiction, and the Court having entered its order so dismissing the complaint and the Court having tried the intervention case upon the issues joined by the amended complaint in intervention and answer thereto and having considered the stipulation of facts, memoranda, and argument of counsel, makes its findings of fact and conclusions of law as follows:

## Findings of Fact

### I.

The United States of America is a sovereign and corporate body politic.

### II.

Intervention in this action was directed by the Attorney General of the United States and authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States.

## III.

Defendant in intervention Dan O. Hoye is the duly elected, qualified and acting Controller of the City of Los Angeles, California. [30]

## IV.

Defendant in intervention City of Los Angeles is a municipal corporation of the State of California.

## V.

On the 15th day of August, 1956, a delegate of the Secretary of the Treasury of the United States assessed Federal income taxes for the calendar year 1955 and penalties and interest thereon in the aggregate amount of \$150.63 against the defendant in intervention and taxpayer Richard A. Westberg. On or about August 20, 1956, notice thereof was given to, and demand for the payment of said assessed taxes, penalties and interest was made upon, said taxpayer; but notwithstanding notice and demand, no part of said taxes, penalties and interest has been paid and the whole remains assessed, outstanding and unpaid. Interest accrues on said tax liability at the daily rate of \$.02 until paid.

## VI.

On March 19, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoye a Notice of Levy, in the sum of \$155.93, upon all property



and rights to property belonging to the aforesaid taxpayer.

## VII.

On June 25, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoyer a Final Demand for the amount set forth in the Notice of Levy, \$155.93.

## VIII.

On the dates of service of said Notice of Levy [31] and Final Demand, as aforesaid, the defendant in intervention Richard A. Westberg was an employee of the defendant in intervention City of Los Angeles, and by reason of said employment said City was indebted to said Richard A. Westberg in the sum of \$158.78.

## IX.

The defendant in intervention Dan O. Hoyer at the time of service of said Notice of Levy and at the time of service of said Final Demand, as aforesaid, did not pay over or surrender to the plaintiff in intervention and its agents the property, rights to property, monies, credits, and other obligations owing to the defendant in intervention Richard A. Westberg, which were in his possession as aforesaid at the time of service of said Notice of Levy and Final Demand upon him. The defendant in intervention Dan O. Hoyer did not seek to avoid said Notice of Levy and Final Demand and did not

undertake to defeat the collection of taxes described but did contend and assert that the United States of America and Robert A. Riddell, Director of Internal Revenue, were required to proceed in accordance with Sec. 710 of the Code of Civil Procedure of the State of California. Defendant in intervention Dan O. Hoyer continued to hold the monies due Richard A. Westberg which were in Hoyer's possession at the time of the levy. Defendant in intervention Dan O. Hoyer in good faith and for the purpose of procuring a judicial declaration of the validity of his said contention, commenced an action in this Court. Ancillary thereto but without authority of any statute or rule of Court, said defendant in intervention Dan O. Hoyer delivered to the Clerk of Court the payroll check then owing to Richard A. Westberg in the amount of \$158.78. Said check was [32] payable to Richard A. Westberg. Upon Order of Court the Clerk returned said payroll check to defendant in intervention Dan O. Hoyer who now holds the same in his possession.

## X.

None of the property or rights to property subject to the levy was at the time of levy and demand subject to an attachment or execution under any judicial process within the meaning of Sec. 6332(a) of the Internal Revenue Code of 1954.

## XI.

Defendant in intervention Dan O. Hoyer is a "person" as defined by Sec. 6332(c) of said 1954 Code.

## XII.

Every conclusion of law herein deemed to be a finding of fact is hereby found as a fact.

### Conclusions of Law

#### I.

This Court has jurisdiction over the complaint in intervention and the parties thereto.

#### II.

This Court does not have jurisdiction of the subject matter of the complaint or over the United States of America as a defendant thereto.

#### III.

The deposit of defendant in intervention Richard A. Westberg's payroll check, by defendant in intervention Dan O. Hoyer, was not an effective compliance with the levy and final demand referred to in the foregoing finding of fact. It was not a valid interpleader. Said deposit was [33] made in good faith and in an effort to maintain the status quo of the monies then due defendant in intervention Richard A. Westberg until final determination of the contention that the United States must proceed in accordance with Sec. 710, California Code of Civil Procedure. Defendant in intervention Dan O. Hoyer attempted to surrender the property and rights to property subject to the levy by way of a deposit into this Court to be paid to the United

States if this Court determined that the law permitted the United States to collect the sum due from Richard A. Westberg without following the procedure described by said California Code Section. He is liable in his own person and estate to the United States in a sum equivalent to the value of the property which was the subject of the levy if by his delay in honoring the levy the monies primarily due Richard A. Westberg have become unavailable to the levy. He is not liable for a penalty because his actions have been in good faith and he sought only a judicial determination of his obligation in regard to the levy.

#### IV.

Plaintiff in intervention has a valid and subsisting lien for the delinquent tax liability for the year 1955 of the defendant in intervention Richard A. Westberg, which lien is upon all property and rights to property of said Richard A. Westberg, superior to the rights and claims of all the parties hereto.

#### V.

Section 710 of the California Code of Civil Procedure is not here relevant or applicable for the reason that Federal internal revenue statutes enacted pursuant to Constitutional grant are supreme and levies [34] thereunder are self executing and also because said statute relates only to a "judgment for payment of money".

VI.

Plaintiff in intervention is entitled to judgment under Sec. 7403 of said 1954 Code enforcing its said tax lien against the debt owed the taxpayer and defendant in intervention Richard A. Westberg by the defendant in intervention City of Los Angeles in the sum of \$158.78 and for its costs herein to be taxed by the Clerk of this Court.

VII.

Every finding of fact deemed to be a conclusion of law is hereby concluded as a matter of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed:

- 1) That the plaintiffs take nothing;
- 2) That the complaint be dismissed;
- 3) That under its first cause of action (penalty) the plaintiff in intervention take nothing; and
- 4) That under its second cause of action (foreclosure of lien) the plaintiff in intervention have judgment against the City of Los Angeles enforcing its tax lien against the debt owed to defendant in intervention Richard A. Westberg by the defendant in intervention City of Los Angeles in

the sum of \$158.78, and for its costs herein taxed by the Clerk of this Court in the sum of \$20.00 and that defendant in intervention City of Los Angeles is directed and ordered to issue and deliver [35] a check therefor to Robert A. Riddell, Director of Internal Revenue.

This Court retains jurisdiction to enter a Judgment against defendant Dan O. Hoyer in his own person and estate should the Judgment herein against defendant in intervention City of Los Angeles be not promptly paid upon its becoming final.

Dated: This 22nd day of April, 1959.

/s/ ERNEST A. TOLIN,  
United States District Judge.

[Endorsed]: Filed and Entered April 22, 1959.

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[Title of District Court and Cause.]

#### NOTICE OF ENTRY OF JUDGMENT

To The City of Los Angeles and Its Attorneys,  
Roger Arnebergh, Bourke Jones, Alfred E.  
Rogers, Ralph J. Eubank:

You, and Each of You, Will Please Take Notice  
That:

Judgment in the above entitled case was docketed  
and entered on April 22, 1959.



Dated: April 24, 1959. [37]

LAUGHLIN E. WATERS,  
United States Attorney,  
EDWARD R. McHALE,  
Assistant U. S. Attorney,  
Chief, Tax Division,  
ROBERT H. WYSHAK,  
Assistant U. S. Attorney,  
/s/ ROBERT H. WYSHAK,  
Attorneys for United States  
of America. [38]

Certificate of Service by Mail Attached. [39]

[Endorsed]: Filed April 24, 1959.

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[Note: Government's Exhibit No. 2—"Notice of Levy" and Exhibit No. 3—"Final Demand" are set out as Exhibits A and B in Cause No. 15964 at pages 7-11.]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the United States of America, Plaintiff in intervention, and to The United States of America, and Robert A. Riddell, Director of Internal Revenue, Defendants, and to Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief Tax Division, and Robert H. Wyshak,

Assistant United States Attorney, Their Attorneys: [44]

You and Each of You Will Please Take Notice, that the Plaintiff, Dan O. Hoye, as Controller of the City of Los Angeles, and Dan O. Hoye, Plaintiffs above named, and Dan O. Hoye and the City of Los Angeles, a municipal corporation, defendants in intervention, do hereby give notice of and do hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment heretofore docketed and entered on April 22, 1959.

Dated: 17th day of June, 1959.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

RALPH J. EUBANK,

Assistant City Attorney,

/s/ By T. PAUL MOODY,

Deputy City Attorney. [45]

Acknowledgment of Service Attached. [46]

[Endorsed]: Filed June 17, 1959.

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[Title of District Court and Cause.]

### STIPULATION FOR COSTS ON APPEAL

Know All Men By These Presents, That Fidelity and Deposit Company of Maryland, a Corporation organized and existing under the laws of the State

of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America in the penal sum of Two Hundred and Fifty and No/100 (\$250.00) Dollars, to be paid to said Plaintiff, his successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, that whereas, Dan O. Hoyer and The City of Los Angeles is about to take an appeal to the United States Court of Appeals for the Ninth Circuit from a Judgment made and entered on April 22, 1959 by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

Now, Therefore, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against [copy missing] if [copy missing] fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect. [47]

It Is Further Agreed by the Surety, that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed, and dated this 18th day of June, 1959.

FIDELITY AND DEPOSIT COM-  
PANY OF MARYLAND,

/s/ By ROBERT HECHT,  
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ ROGER ARNEBERGH,  
City Attorney,  
/s/ By T. PAUL MOODY,  
Deputy City Attorney.

Approved this 18th day of June, 1959.

/s/ ERNEST A. TOLIN,  
Judge. [48]

Notary's Certificate Attached.

[Endorsed]: Filed June 18, 1959.

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[Title of District Court and Cause.]

SUPERSEDEAS BOND, CASH (RULE 73 d.)

Whereas, Dan O. Hoyer, as Controller of the City of Los Angeles, and Dan O. Hoyer, Plaintiffs, and Dan O. Hoyer and the City of Los Angeles, a municipal corporation, Defendants in intervention, filed Notice of Appeal from the judgment heretofore entered and docketed in the above entitled action on April 22, 1959, and [50]

In lieu of the filing of a corporate surety supersedeas bond herein Roger Arnebergh, City Attorney, City of Los Angeles, does hereby deposit with the Clerk of the above-entitled court the sum of Two Hundred Dollars (\$200) cash, said deposit conditioned as follows:

The condition of this deposit is such that if said appellants shall pay and satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then this deposit shall be refunded to Roger Arnebergh, City Attorney, City of Los Angeles; that should said judgment together with costs, interest, and damages not be so paid then the United States of America is authorized and directed to proceed against said deposit pursuant to Rule 8 (c) of the above-entitled court, to satisfy and pay all of said items, and any balance remaining, if any, shall be refunded to Rober Arnebergh, City Attorney, City of Los Angeles.

The cash deposited herein is the property of the City Attorney Litigation Fund, City of Los Angeles; that Roger Arnebergh is the duly elected, qualified and acting City Attorney of the City of Los Angeles, California.

DAN O. HOYE and the CITY  
OF LOS ANGELES,  
/s/ By ROGER ARNEBERGH,  
City Attorney. [51]

Subscribed and sworn to concerning statements as to ownership of fund before me this 18th day of June, 1959.

/s/ GENEVIEVE UPDEGRAFT,  
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires April 30, 1963.

Examined and recommended for approval as provided in Rule 8.

ROGER ARNEBERGH,  
City Attorney,  
/s/ By T. PAUL MOODY.

I hereby approve the foregoing and fix the supersedeas bond at said sum of \$200.00 cash.

Dated this 18th day of June, 1959.

/s/ ERNEST A. TOLIN,  
United States District Judge.

Receipt of the sum of Two Hundred Dollars (\$200) cash is hereby acknowledged this . . . . day of June, 1959.

JOHN A. CHILDRESS,  
/s/ By L. CONLIFFE,  
Clerk, United States District Court, Southern District of California, Central Division. [52]

[Endorsed]: Filed June 18, 1959.



[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

(F.R.C.P. Rule 75 (a))

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Plaintiffs-Defendants in Intervention-Appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals, Ninth Circuit, taken by Notice of Appeal filed June 17, 1959, the following portions of the record and proceedings in this action:

(1) The Complaint of Plaintiffs filed herein September 10, 1957.

(2) Notice of Motion to Intervene and Motion to Intervene of the United States of America, together with copy of Complaint in Intervention for Penalty Under Section 6332 (b) of The 1954 Internal Revenue Code, attached thereto.

(3) Notice of Motions to Dismiss and Motions to Dismiss and Supporting Memorandum, together with the Supporting Memorandum of Points and Authorities attached thereto.

(4) Points and Authorities of the Plaintiff in Opposition to Motions to Dismiss by defendants United States of America and Robert A. Riddell, Director of Internal Revenue, and Motion to File [55] Complaint in Intervention.

(5) Minute Order entered by the Court on February 6, 1958, granting defendants' Motion to Intervene.

(6) Order permitting Intervention by the United States of America, dated February 6, 1957.

(7) Amended Complaint in Intervention, for Penalty and for Foreclosure of Internal Revenue Tax Lien Against Personal Property, together with the Summons attached thereto.

(8) Complaint in Intervention for Penalty filed February 21, 1958.

(9) Order granting Motion to Dismiss, dated March 10, 1958.

(10) Notice of Order granting Motion to Dismiss, dated March 10, 1958.

(11) Notice of Appeal filed herein on March 17, 1958.

\*(See Note below.)

(12) Answer of certain defendants in intervention filed April 14, 1958.

(13) Stipulation of Facts on file herein.

(14) Memorandum of Decision signed by Hon. Ernest A. Tolin, United States District Judge dated [56] December 11, 1958.

(15) Notes to the Memorandum of Decision dated December 12, 1958.

(16) Addendum to the Memorandum of Decision dated and filed April 22, 1959.

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\* All items listed in Nos. 1 to 12 inclusive were designated on the prior appeal in the above entitled matter and are a part of the record now pending before the United States Court of Appeals, Ninth Circuit (In Case No. 15,964).

(17) Findings of Fact, Conclusions of Law and Judgment signed, dated and entered April 22, 1959.

(18) Notice of Entry of Judgment.

(19) Notice of Appeal filed June 17, 1959.

(20) Stipulation for Costs on Appeal filed June 18, 1959.

(21) Supersedeas Bond—Cash (Rule 73d) filed June 18, 1959.

(22) Notice of levy by Director of Internal Revenue, addressed to Dan O. Hoyer as Controller of the City of Los Angeles.

(23) Final Demand of the Director of Internal Revenue.

(24) This Designation of Record.

ROGER ARNEBERGH,  
City Attorney,

BOURKE JONES,  
Assistant City Attorney,

RALPH J. EUBANK,  
Assistant City Attorney,

/s/ By T. PAUL MOODY,  
Deputy City Attorney,  
Attorneys for Plaintiff-  
Appellants. [57]

Affidavit of Service by Mail Attached. [58]

[Endorsed]: Filed June 25, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL  
(F.R.C.P. RULE 75 (d))

Plaintiffs-Defendants in Intervention-Appellants herein do hereby present the points upon which they claim the District Court erred:

(1) The Court erred in adjudging that the plaintiffs take nothing by reason of their complaint;

(2) The Court erred in adjudging that the complaint of Plaintiffs be dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants;

(3) That a conflict of laws exists by virtue of diverse judgments in the lower District Courts of the Southern District of California, Central Division, including the judgment rendered herein, which judgments create confusion and uncertainty in the minds of all public officials in the State of California, whose duties and responsibilities include the disbursing of public funds to employees of the State of California, and to employees of counties, cities and all other political subdivisions of said State;

That such conflict of laws must be resolved [62] to afford protection to all such public officials

thereby permitting a more efficient operation of government.

ROGER ARNEBERGH,  
City Attorney,  
BOURKE JONES,  
Assistant City Attorney,  
RALPH J. EUBANK,  
Assistant City Attorney.

/s/ By T. PAUL MOODY,  
Deputy City Attorney. [63]

Affidavit of Service by Mail Attached. [64]

[Endorsed]: Filed June 25, 1959.

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[Title of District Court and Cause.]

### CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

Page

1. Names and Addresses of Attorneys.

1-A to 1-V, incl. Answer of Certain Defendants in Intervention, filed 4/14/58.

2. Stipulation of Facts, filed 7/25/58.

## Page

7. Memorandum of Decision, filed 12/11/58.
17. Note to the Memorandum of Decision, filed 12/12/58.
19. Addendum to the Memorandum of Decision, filed 4/22/59.
29. Findings of Fact, Conclusions of Law and Judgment, filed and entered 4/22/59.
37. Notice of Entry of Judgment, filed 4/24/59.
40. Notice of Levy (Marked as Govt's Exb. 2).
42. Final Demand (Marked as Govt's Exb. 3).
44. Notice of Appeal, filed 6/17/59.
47. (Certified copy) Stipulation for Costs on Appeal, filed 6/18/59.
50. (Certified copy) Supersedeas Bond, filed 6/18/59.
53. Designation of contents of record on appeal, filed 6/25/59.
60. Statement of Points on Appeal, filed 6/25/59.

Dated: July 23, 1959.

[Seal]

JOHN A. CHILDRESS,  
Clerk,

/s/ By WM. A. WHITE,  
Deputy Clerk.



[Endorsed]: No. 16553. United States Court of Appeals for the Ninth Circuit. Dan O. Hoyer, as Controller of the City of Los Angeles, Dan O. Hoyer and The City of Los Angeles, Appellants, vs. United States of America and Robert A. Riddell, Director of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 24, 1959.

Docketed: July 29, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

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[Letterhead of Office of City Attorney, City Hall,  
Los Angeles 12, California]

Office of the Clerk

August 24, 1959

U. S. Court of Appeals  
For the Ninth Circuit  
San Francisco 1, California

Re: Your No. 16553  
Hoyer vs. U. S. A.

Dear Mr. O'Brien:

In reply to your letter of August 20, 1959, directing the attention of Mr. Moody to your Rule 17, the undersigned has reviewed the file in this office and notes that a Statement of Points on Appeal (F.R. C.P. Rule 75 (d)), and a Designation of Contents

of Record on Appeal (F.R.C.P. Rule 75 (a), was filed with the Clerk of the District Court here on June 25, 1959, and a copy of each of these documents mailed on the same date to Laughlin E. Waters, U. S. Attorney, and Edward R. McHale and Robert H. Wyshak, Assistant U. S. Attorneys at the Federal Building. I also note that as of July 23, 1959, John A. Childress, Clerk of the Court certified certain described documents to your Court, including the two documents described above.

We are satisfied with the documents as filed with the District Court and hereby adopt such above referred to statement of points and designation of record for the purposes of this appeal.

A copy of this letter will be mailed to the office of the U. S. Attorney here.

Thank you for your calling this matter to our attention.

Very truly yours,

ROGER ARNEBERGH,  
City Attorney,

T. PAUL MOODY,  
Deputy City Attorney,

/s/ By JOHN F. FELDMEIER,  
Deputy City Attorney.

TPM:MR

cc—Laughlin E. Waters

United States Attorney

[Endorsed]: Filed August 25, 1959. Paul P. O'Brien, Clerk.

In the United States Court of Appeals  
for the Ninth Circuit

No. 16553

DAN O. HOYE, as Controller of The City of Los  
Angeles, and DAN O. HOYE,  
Plaintiffs-Appellants,  
vs.

UNITED STATES OF AMERICA, ROBERT A.  
RIDDELL, Director of Internal Revenue, and  
RICHARD A. WESTBERG,  
Defendants-Appellees.

UNITED STATES OF AMERICA,  
Plaintiff in Intervention-Appellee,  
vs.

DAN O. HOYE, CITY OF LOS ANGELES and  
RICHARD A. WESTBERG,  
Defendants in Intervention,

DAN O. HOYE, CITY OF LOS ANGELES,  
Defendants in Intervention-Appellants.

STIPULATION FOR USE OF RECORD AND  
BRIEFS IN PRIOR APPEAL NUMBERED  
15964

It Is Hereby Stipulated between Dan O. Hoyer, as Controller of the City of Los Angeles, and Dan O. Hoyer, Plaintiffs-Appellants, and Dan O. Hoyer, and City of Los Angeles, Defendants in Intervention, Appellants, and United States of America, Robert A. Riddell, Director of Internal Revenue, Defendants-Appellees, and the United States of

America, Plaintiff in Intervention, Appellee, by their respective counsel, that the record in the prior appeal numbered 15964, may be considered as a part of the record in the instant appeal numbered 16553, and

It Is Further Stipulated that the briefs in the prior appeal numbered 15964, may be considered in the instant appeal numbered 16553.

Dated: October 7, 1959.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

RALPH J. EUBANK,

Assistant City Attorney,

T. PAUL MOODY,

Deputy City Attorney,

/s/ By T. PAUL MOODY,

Attorneys for Appellants.

/s/ CHARLES K. RICE (J.),

Assistant U. S. Attorney General, Tax Division,  
Department of Justice,

LAUGHLIN E. WATERS,

U. S. Attorney,

EDWARD R. McHALE,

Assistant U. S. Attorney,

Chief Tax Division,

ROBERT H. WYSHAK,

Assistant U. S. Attorney,

Attorneys for Appellees.

[Endorsed]: Filed October 15, 1959. Paul P. O'Brien, Clerk.